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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-39

MEMPHIS LIGHT, GAS AND WATER DIVISION; CALVIN HENZE, HENRY T. WINKELMAN, ELIOT WHITTINGTON, ROBERT S. BOWERS and PATRICIA SHAW, Commissioners,
Petitioners,

v.

WILLIE S. CRAFT and MARY CRAFT, MS. IDA BELL HOLMES, MS. ANNA SUE FUNZIE, MS. SARA PARKS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PETITIONERS

FRIERSON M. GRAVES, JR.,
2020 First Tennessee Bank Building
Memphis, Tennessee 38103
(901) 525-8231
Counsel for Petitioners

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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OPINIONS BELOW

The Opinion of the Court of Appeals, was printed as Appendix "A" of the Petition for Writ of Certiorari filed herein. The Opinion of the District Court for the Western District of Tennessee was not reported but was printed as Appendix "B" of the Petition for Writ of Certiorari filed herein.

JURISDICTION

The Opinion of the Sixth Circuit was filed on April 12, 1976. The Petition for Writ of Certiorari was filed on July 12, 1976. The Petition was granted February 22, 1977.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Is utility service, including utility service without payment of charges, a property right which is protected by the Due Process Clause of the Fourteenth Amendment?

2. Assuming utility service is "property," must there be a prehearing termination procedure before cutoff or is the termination procedure of the Memphis Light, Gas & Water Division a constitutionally sufficient procedure meeting the minimum requirements of due process of law?

3. Are the cutoff policies of the Memphis Light, Gas & Water Division, a municipally owned utility, which operates in a proprietary capacity without governmental immunity but on a nonprofit basis, subject to the provisions of the Fourteenth Amendment requirements of due process?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment to the United States Constitution and of the Charter of the City of Memphis are set forth in Appendix "A" hereto.

STATEMENT OF THE CASE

History of the Litigation

The United States Court of Appeals for the Sixth Circuit held that utility service was a property right entitled to due process.

The Sixth Circuit further held that the "final notice" and extended credit procedures were constitutionally sufficient for a customer like Parks who asserted an inability to pay an admitted liability. The Sixth Circuit further held that the "final notice" forwarded to the customer with the enclosure that the customer having difficulty paying the utility bill is instructed to bring the bill to certain neighborhood credit counselors or to the Memphis Light, Gas & Water Division offices to discuss the utility payment plan was not constitutionally sufficient when there was a dispute as to the correctness of the bill.

The Sixth Circuit further held that the "hearing procedure" was not constitutionally sufficient for the Crafts, although sufficient for Parks who had an admitted liability.

The Sixth Circuit further determined that no class action was applicable.

The plaintiffs, as customers of the Memphis Light, Gas & Water Division, alleged in their suit that utility services were being terminated without due process of law. The plaintiffs filed suit on their own behalf and as a class. The Memphis Light, Gas & Water Division agreed not to terminate utility service of the named plaintiffs pending the trial on the merits so long as regular payments for current uses of utilities were made.

The Trial Court held that the Memphis Light, Gas & Water Division had not violated any of the plaintiffs' rights to due process of law. There seemed to be some implied holding by

the District Court that utility services represented property. The District Court suggested, but did not require, that the Memphis Light, Gas & Water Division change the notices of termination to provide more specific information about customer relations and disputes. This was done and the "Amended Notice" is set out in the Appendix, page 193.

There is no question before this Court concerning the equal protection claim of the plaintiff Holmes because of the Memphis Light, Gas & Water Division's error in refusing to initiate service because of past due bills of her common law husband. However, any holding of property on due process that would be applicable to the other plaintiffs would be equally applicable to Holmes or any other customers.

While the Sixth Circuit held that the final notice was sufficient for a customer with an admitted inability to pay and for which credit counseling for assistance in utility payment plans were available, the underlying question of whether such utility service is property is an issue before this Court.

Memphis Light, Gas & Water Division

The Memphis Light, Gas & Water Division is a division of the City of Memphis created by an amendment to the Charter of the City of Memphis. The President is appointed by the Mayor and approved by the City Council and required to devote his full time to the management of utility services. There are four citizen members appointed to the Board of Commissioners by the Mayor and approved by the City Council. This five member board is responsible for setting all rules and regulations and the operation of the Memphis Light, Gas & Water Division.

The Memphis Light, Gas & Water Division is a three service utility. It offers electricity as a distributor purchasing from the

Tennessee Valley Authority. The Tennessee Valley Authority is an agency created by act of Congress serving a geographical area of the country and providing electricity at the lowest possible rates. The gas division is a gas distributor purchasing from a pipeline subject to control of the Federal Power Commission. The water division operates the water distribution in Memphis and Shelby County.

The Memphis Light, Gas & Water Division has approximately 235,000 residential consumers of electricity; 200,000 residential consumers of gas; and 165,000 residential consumers of water. Some multiple dwellings have only one meter for water whereas there are individual meters for electricity or gas to the service customers. (App. 73)

As shown by the bills introduced, the Memphis Light, Gas & Water Division bills its customers monthly for electric, gas and water plus the sewer charge based upon usage of water and the City service fee which is to provide for sanitation services and collection of garbage. (App. 32-40)

The Memphis Light, Gas & Water Division is to operate on a nonprofit basis and was established for the purpose of providing low utility rates to citizens of the City of Memphis. The Charter provisions requiring the revenue to be used for certain operating expenses, capital improvements and other matters with any surplus required to be devoted solely to rate reductions is set forth in Appendix "A" hereto.

Billing and Termination Procedures in Question.

A customer who has a satisfactory credit experience with the Memphis Light, Gas & Water Division (hereinafter referred to as the "Division") may receive service for approximately ninety days before termination of his utilities (App.

113) A new customer or a customer with bad credit experience with the Division may have approximately sixty-five days of service without payment before there is a termination. (App. 115) A chart outlining the sixty-five day period was explained by the Secretary-Treasurer, Mr. Mullen. (App. 112-118)

The service area of the Division is divided into twenty-one cycles representing the approximate number of working days per month. Each cycle of meters is read on a rotating basis throughout the month and all meters are read every month except for unusual circumstances. If a meter in cycle one is not read because of bad weather or holiday or some other circumstance and in the next monthly cycle reading there is some other circumstance which would prevent the reading of the same cycle, the Division would skip cycle two and read cycle one on cycle two's day so that a meter is not skipped for more than one month for the purpose of providing the customer with the exact usage rather than estimating his bill. (App. 143-44)

The steps in providing and terminating service indicating the sixty-five day period are as follows:

Step 1

Service is connected upon request by telephone through the information center or in person at the Administration Building or at the Millington office. It is assumed for purpose of the chart that this took place on January 2. (App. 117, 156)

Step 2

If the meter reading date falls within five days after connection of service, no bill will be rendered. The first billing for consumption will be over a period of six to thirty-five days. It is assumed that the bill is read on January 31st. (App. 114, 117)

Step 3

The bill is mailed approximately four days after the meter reading date and the bill will be mailed to the service address or to any address designated by the customer. (App. 114, 117)

Step 4

As is indicated on the bill there is a net amount and a gross amount charged. The customer is advised of the last day to pay the net amount which would be approximately twenty days after the meter reading date or approximately sixteen days after the bill is mailed to the service address. (App. 114, 117)

Step 5

If the customer has not paid by February 25, or five days after the last day to pay net, and approximately twenty-five days after the meters are read, a red or final notice is mailed stating that services will be disconnected within approximately four days if no payment is received. The red or final notice (Exhibit F Appendix 43) is enclosed in an envelope to assure privacy of the customer. (App. 112) The final notice gives the specific date that services will be terminated if no payment is received or if some provision is not made for payment of the outstanding balance. Final notice will not be mailed if the customer owes less than $26.00 or the Division holds a deposit equal to twice the outstanding balance. (App. 73)

Included with this final notice is a "stuffer" or "flyer." For the fourteen cycles in which no neighborhood credit counselors are available the notice stated:

> "If you are having difficulty paying your utility bill and would like to discuss a utility payment plan, or if there is **any dispute** concerning the amount due, bring your bill to

the office at 220 South Main, Monday through Friday, or phone 527-0311." (emphasis supplied) (App. 137)

In the seven cycles in which there were neighborhood credit counselors the notice stated:

> "If you are having difficulty paying your utility bill, bring your bill to our neighborhood credit counselors for assistance. Your utility bills may be paid here also. (No phone calls accepted at neighborhood locations) . . .
> "You can also receive credit help at the main office at 220 South Main from 8:30 a.m. to 5:00 p.m., Monday through Friday, phone: 523-0711." (App. 45)

The Sixth Circuit stated that approximately one-third of the customers would receive notice of the well-publicized extended payment plan but would not receive any notice about settling "any disputes" since this was not mentioned on this notice.

Step 6

The meter reader will be utilized on March 1 to make a one service cut off of electricity. (App. 112) Cut off of service will not be made if, in response to a knock on the door, the customer states the payment is in the mail, shows a paid receipt or there is illness or hardship. (App. 125, 140, and Manual 63-66) At this point there can be a maximum of sixty-five days of consumption. Step 6 can be avoided if the customer will avail himself of the extended payment plan or contacts the Division requesting an extension of time to pay.

The records of the Division indicate that during 1973 43,000 persons were granted extensions or approximately 91% of those requesting extensions. (App. 126) The extensions would be posted directly into the computer by the telephone operator who had authority to grant extensions of up to three days. (App. 176-177)

Step 7

Approximately five days after the one service cut off (or the failure to cut off one service because of an extension for a limited period of time) the remaining services will be terminated (gas and water) if the customer has not paid the bill or made arrangements for payment. (App. 114)

There are approximately thirty-five to forty employees in the Information Center who receive telephone calls, including telephone calls requesting extensions for payment of bills. These trained and experienced employees are authorized to grant extensions up to three days for the payment of bills which would bring the person within one day of the total service cut off. (App. 126, 127)

The meter reader is instructed to knock on the door and to make every attempt to get someone to the door. If no response, then a green tag or door knocker is to be left at the door that is most obviously used for entrance to the premises. (App. 112) The language of the door knocker card is set forth in the Appendix, page 139 and Exhibit G (App. 44).

The meter reader has certain instructions so that if the customer claims that the bill has been paid and he has a money order receipt or if there is some hardship or sickness or if it appears the customer is on vacation, then no cut off is made of one service by the meter reader. (App. 64-66) An additional five days is allowed until the disconnect order (DCO) when all services are terminated. (App. 114)

The customer may pay the bill at approximately 100 locations throughout the city as well as the main office. (App. 113) The Division has arranged over the years to have the utilities paid at various stores and other locations for the convenience of the customer (App. 121) and if the utilities are paid before 4:00 p.m., service will be reconnected the same day. If not, service will be connected the next day. (App. 139)

During 1973, the records indicate that 3,100,000 bills were mailed and 202,000 final notices were mailed. (App. 124) This would indicate that a great number of people do not pay their utility bills within the approximately fifteen days allowed, but elect to pay them at a later time. (App. 124) Since, either through payments or extensions, only 47,000 one service cut offs were issued and only 22,000 completed, it is evident that the meter reader was either advised of payment or of some acceptable excuse to avoid the one service cut off. (App. 124) There were 26,000 all service cut offs issued which would indicate that certain individuals had received extensions but had not made the payments although only 62% or 16,000 complete service cut offs were estimated as made. (App. 125, 127)

The records indicate that through the main office, 62,000 customers contacted the credit department as well as 3,500 at neighborhood counseling facilities for credit or other assistance. (App. 127)

The Division further would accept and investigate any complaint of high bills and 33,000 were investigated in 1973 and cutoff procedures delayed during investigation. (App. 128)

Customer Relations

All of the billing procedures, collection procedures and extended payment procedures were designed as Mr. Mullen testified to keep the customer "on line" for the purpose of generating revenue for the utility in order to pay its expenses as well as to provide all the necessary utility services for the customer.

The plaintiffs failed to produce any other information from the records of the Division or from the Interrogatories to support any allegation of failure of a customer to be programmed to receive a final notice prior to termination. A final notice is mailed and personal contact made or attempted or a door knocker card is

left upon any termination. The records in this case do not support any finding that the Division was insensitive to the customer's needs for service or the customer's need for credit or the customer's need to resolve problems concerning complaints on high bills, utility service leaks, or other matters of adjustment handled through the credit office.

Extended Payment Plan

Advertising. The Division adopted in March of 1973 an extended payment plan to prevent utility disconnection of customers who were in a temporary period of financial hardship. The plan, with the various forms, are explained in detail in the procedure of New Credit Policy for Extended Payment Plan which is printed in the Appendix 46-60. The Division advertised extensively the extended payment plan to advise its customers. Some 400 spot announcements on the radio were made during the period of time of initial investigation and newspaper advertisements were taken in various newspapers. The Division's Speakers Bureau furnished speakers to church or civic groups and service organizations. Organizations working with low income individuals were forwarded information about the plan. (App. 118-122)

The Plan. A customer who is in a temporary period of financial adversity is advised by the "flyer" or "stuffer" with the final notice that he may request assistance either from the neighborhood credit counselor or from the main office. (App. 45) The extended payment plan has approximately thirteen credit counselors who have written guide lines. (App. 161) While there is some flexibility, the general rule is the customer is requested to pay one half of the bill for a single month and have the balance divided usually on the next three utility bills. Additionally, the Credit Department was given authority, by the written rules, to extend the time even further, up to approximately one year, in

extreme cases. After a payment plan is agreed upon, no further disconnects will be made so long as the customer fulfills his obligations as agreed to under the credit plan, a copy of which is given to him. His monthly bills show "extended payment plan" (EEP) together with the current billing. (App. 123-124, 46-63)

All the credit facilities are located on the first floor of the main office for the convenience of the customer. (App. 231)

The instructions for the meter readers are shown as Exhibit "2" to the Interrogatories concerning customer accounting which shows what to do about illness and other matters. (App. 64-66) The instructions for the customer service men for turn off and turn on procedures were attached as Exhibit "66-68" to the Answer of Interrogatories which indicate that the Division is to be courteous in making the turn off procedure. (App. 67)

Patricia Pintchuck

Patricia Pintchuck was not a plaintiff but was called to testify at the hearing for preliminary injunction. Her testimony indicated that when the meter reader came to turn off the services she advised the employee that her daughter was sick and he did not terminate the service. (App. 82-83) Miss Pintchuck stated that she knew that the Division did not usually make a practice of cutting off where there was a sick child in the house and the Division left the utilities on. (App. 83)

Mary Craft

The Crafts had a problem with their utilities as the result of the purchase of a house which had two electric meters, two gas meters and only one water meter. The residence had, in fact, been used as an apartment or a duplex and the Crafts received split billings. (App. 8, 21, 102, 147) Each meter registered the gas and electricity used in a particular portion of the house and the water meter was for the entire house. (App. 147) When the Crafts moved in, Mrs. Craft admitted there was a place like somebody had had another kitchen but she used it for a den. (App. 108) When the Crafts bought the property in October of 1972, they relied upon the seller who said don't worry about the meters. (App. 102) She did not know that the previous occupants paid two meters. (App. 85) She saw the two meters when they took over the house. (App. 98) She did not receive a bill for water services until June, 1973, when an employee of the Division, whose name is not known, told her that she was not paying a water bill. (App. 85-86)

When the Crafts moved into the house, Mrs. Craft asked that the utilities be transferred to Willie S. Craft. (App. 85) Whether this was for a particular address or whether this apartment had two addresses is not known but there were two accounts.

The records indicate that there were approximately 235,000 residential consumers of electricity as opposed to 165,000 residential consumers of water so that many multiple dwellings have one meter for water and unless specifically told of there being two accounts and of the charge for both, the Division would have no knowledge that the apartment was eliminated. (App. 73)

The records show that when the Crafts took over the utilities and service was connected on October 8, 1972, that they did receive gas and electric services but no water bill although they were receiving water. (App. 85 and Ex. A, pgs. 32-36) This did not appear to put the Crafts on notice that something was wrong. (App. 85)

The records indicate a disconnect order on January 5, 1973, in the name of Ed Fatheree and a meter reading date of May 29, 1973, which may have been the June date of Mrs. Craft

when she was told she was not paying for water. (App. 85 and Ex. A, pgs. 32-36) There was a disconnect made before the connect was made and the Crafts were billed back to January, 1973, for the water service although they had occupied the house since October of 1972. (App. 33) There was electric consumption used on each meter each month together with a minimum gas bill for one gas meter which evidently was for the connections in the second kitchen now not used but for which a meter continued to be maintained on the house. (App. 32-36, Ex. A)

Mrs. Craft testifies of coming to the Division several times to attempt to straighten out the matter and going to the owner of the house. (App. 90, 92, 102) She finally ordered the electric meter and the gas meter disconnected. (App. 94) The matter was further complicated because the electrician disconnected the electric meter for one of the accounts and the plumber disconnected the gas meter on the other account. The Crafts thus continued to receive two bills because of the mistakes of the independent contractors which was later rectified by combining the accounts. (App. 94, 101, 148)

The Crafts claimed no termination notices were received (App. 46) but the records of the Division indicate that termination notices were mailed or were processed by the computer for mailing on 8-21-73, 9-20-73, 10-19-73, 11-20-73, 12-20-73, 1-23-74, 2-21-74, 3-22-74 and 4-23-74 as shown by the Amendment to the Answer. (App. 62) The Crafts' utility bills became delinquent and finally an extended payment plan was arranged as shown by Exhibit "A" to the Answer. (App. 33) Mrs. Craft stated she did not know what she was paying in the extended payment plan. (App. 105)

Mr. Mullen testified that the Division had no responsibility to determine how many meters a customer had at the particular house and that it was the responsibility of the customer to combine the meters by using an appropriate electrician or plumber

as they desire. (App. 144-145) Mr. Mullen indicated that the Crafts, as testified, would have been referred to City Hall to adjust the City service fee and Mrs. Craft was told to go to City Hall, Room 607, for any such adjustment. (App. 96) Mrs. Craft was receiving the utility services and she was receiving split billing. (App. 147)

Ms. Anna Sue Funzie

Ms. Funzie did not appear to testify at the trial but evidence indicated, as shown by the District Court's Opinion (Petition for Certiorari, Appendix B, page 41), that she had had her utility services terminated by the Memphis Light, Gas & Water Division at least two times and each time service was reconnected by others, nonemployees of the Division and without the knowledge and approval of the Division and without payment of her delinquent account. Her services were connected at 968 Leath on September 21, 1973, and she moved from that address on March 13, 1974, owing $161.26 and had services connected at another address. She admitted in the Complaint that she received final notice and she paid nothing for her utilities. The Sixth Circuit comments in footnote 1 (Petition for Certiorari, Appendix "A", Page 22) that there was no claim of error on the dismissal of the Funzie claim; indeed, Ms. Funzie's counsel in his brief admitted that her utilities were terminated for failure to pay for current usages about which there was no dispute.

Ms. Sara Parks (Sarah Lee Parker)

Ms. Parks was listed in the Division's accounts as Sarah Lee Parker with her address at 1194 Coker. Ms. Parks moved into the house but did not receive a bill. When utilities are found in use and there is no person signed up for the account, occupant letters are sent to the address urging the customer to

come in and sign up or else a cut off is made. The occupant letter states:

> "Dear Occupant: You are using gas, electric and water service at this address but we do not have a request from you for this service. If you have recently moved into these premises, possibly you overlooked this in attending to the many details of moving. Please contact our office within three days and make arrangement for this service . . . If these arrangements have not been completed by the end of this time, the Division will have to disconnect these services. We earnestly invite your immediate attention to this matter since we do not wish to inconvenience you in any manner. Your cooperation will be appreciated." (App. 172-173)

Ms. Parks was first billed approximately March 1, 1973, and on April 26, 1973, after making partial payment, agreed to an extended payment plan. She failed to pay under the extended payment plan and termination notices were sent and she was terminated for nonpayment. (Exhibit "O" to Answer) (App. 41-42) The Court of Appeals had indicated that the final notice was constitutionally sufficient for a customer like Parks who asserts an inability to pay an admitted liability and received the notice to come in and discuss a utility payment plan with credit counselors.

District Court in Finding for the Division Suggested That the Division to Additional Measures

In accordance with the Memorandum Opinion, the Division submitted additional procedures, including a new notice, to go in all customer final notice mail outs and this notice was noted in footnote 6 of the Court of Appeals Opinion (Petition for Certiorari, Appendix "A", page 28). The full contents of the new notice, which was approved by the District Court, is in the Appendix, pages 193-194.

SUMMARY OF THE ARGUMENT

1. **The definition of property**

The issues before this Court are whether continued utility services is property entitled to due process protection and, if property, are the procedures of the Memphis Light, Gas and Water Division sufficient to meet due process requirements or if common law remedies are adequate to meet due process requirements.

This Court has defined property in general terms in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, and has used that definition in many cases to determine whether or not a person had a legitimate claim of entitlement to the benefit so as to make it a property interest. The Court has repeatedly held that property interests are not created by the Constitution, but are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understanding that secure certain benefits and that support claims of entitlement to those benefits.

2. **Utility service is not a property right.**

Utility service is not a property right in Tennessee and was so held by the Tennessee Supreme Court in *Patterson v. City of Chattanooga*, 192 Tenn. 267, 241 S.W. 2d 291. The Tennessee Supreme Court found the rule in Tennessee and insofar as it could find, the rule in every state in the union where the question had arisen that a public utility furnishing a water supply, either in a private or municipal capacity, may adopt reasonable rules, including a rule that the water so furnished may be cut off for nonpayment therefor.

The Memphis Light, Gas and Water Division contends that the common law right or entitlement is in the utility company

to terminate for nonpayment and there is no right of a user to continued services except upon notice and pretermination hearing.

The common law right of the utility to terminate for nonpayment is based upon the unequivocal theory that higher rates would result if the utility was required to go through standard collection procedures prior to cutoffs, the bills are relatively small in amount in comparison to the cost of collection and it would be discriminatory in that the paying customer would in effect be carrying those in default who were still receiving service. A utility's rules and regulations are built upon nondiscriminatory service to all customers based upon reasonable rules and regulations.

It is equally true that in rendering bills, the utility must give a reasonable payment date and that if not paid by the payment date, termination will be made. Utilities are under an obligation to furnish the services to all inhabitants at designated rates and without discrimination, but the utility is allowed to adopt reasonable rules for the conduct of its business and operation and such rules are binding upon the customers or patrons and may be enforced by the company, even to the extent of denying services to those who refuse to comply with them. This common law right is undisputed that a utility could cut off service for nonpayment of bills.

There is no common law right to protect the customer, but the common law right is in favor of the utility to discontinue and does not require continued service until termination by due process.

There is a distinction between a rule which requires a utility to cut off for nonpayment of bills after it has rendered a bill giving a reasonable time to pay as opposed to a rule which says that even after rendering a bill and giving a reasonable time to pay, there must be another notice and pretermination hearing before utilities may be discontinued.

3. **Decisions on why utility service is or is not property.**

The Sixth Circuit in its Opinion relied upon its prior case of *Palmer v. Columbia Gas,* 479 F.2d 153, where it implicitly assumed that continued utility service constituted property. There was no discussion of what statute, rule or other entitlement made such continued service property. The Sixth Circuit cited a number of cases which argue that utility services are essential to life and attempt to apply general statutes on the adoption of nondiscriminatory service or an analogy to other cases that once utility service is established, it cannot be withdrawn without due process. The Division believes that the municipality, as the owner of the utility, is not obligated to furnish services without charge and those who avail themselves of the utility services must pay for it or if not paid for within the reasonable time established to pay the bill, may be terminated thereafter for nonpayment.

4. **If continued utility services are property, the procedures of the Memphis Light, Gas and Water Division meet due process.**

The Sixth Circuit held that the final notice, together with the availability of credit counselors was constitutionally sufficient for a customer like Parks who asserted an inability to pay and admitted liability. The Sixth Circuit, however, stated that there was not sufficient notice to the Crafts who claimed a dispute nor was there a sufficient pretermination hearing available since they were not advised of the appropriate official to contact.

The Division respectfully submits that its procedures as outlined in the Statement of Case of approximately sixty-five days of service prior to termination with its final notice and indication that the Credit Department could be contacted is sufficient. The Division gives approximately fifteen days to pay the net amount, five additional days to pay the gross amount before a final notice is sent, five days additionally before there is any

cutoff and notifies the customer that he may contact the Credit Office. The Credit Office is a responsible part of the Division with responsible and trained personnel to answer all questions concerning the bill, including credit or request for adjustments. The Division, through its extended payment program, its regulations, including service manuals issued to employees, meets any minimum standards of advanced notice and a responsible company official to contact.

5. **The common law remedies available meet due process.**

This Court has recently decided *Ingraham et al. v. Wright, et al.*, — U.S. —, 45 Law Week 4364 (April 19, 1977), which held that at common law a teacher may impose reasonable but not excessive force to discipline a child. This Court stated that the traditional common law remedies are fully adequate to afford due process. We believe that the informal remedies available at the utility, as well as the formal remedies available, are sufficient to afford adequate due process. The customer may seek emergency or injunctive relief in the State Courts to forestall a disconnection. The customer may pay under protest and then sue for a refund. Thirdly, the customer may sue for damages for wrongful termination of services.

We respectfully submit that continued utility services are not property and that services may be terminated for nonpayment of bills without the necessity of notice and a pretermination hearing. If the Court determines that such utility services are property, we believe that there are adequate common law remedies available to the customer of the utility and further that the procedures adopted by the Memphis Light, Gas and Water Division meet the minimum standards of due process.

ARGUMENT

What Is the Definition of Property to Be Applied to Utility Services.

This Court has defined in general terms "property" in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 Sup. Ct. 2701, and has frequently quoted from this case in later opinions when resolving the issue of property. Property has been defined as:

> "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."
> 408 U.S. at 577.

Just prior to that the Court has stated:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."
> 408 U.S. at 577.

The Court has further stated time after time that it will look not to the "*weight*" but to the "*nature*" of the interest at stake. The Court would look to see if the interest is within the Fourteenth Amendment protection of liberty or property.

The Court has also said that the range of interests protected by procedural due process is not infinite. See *Board of Regents v. Roth, supra*, at 570.

The Court has also repeatedly rejected the notion that *any* grievous loss visited upon a person by the state is sufficient to

invoke the procedural protection of the due process clause. See *Meachum v. Fano*, 427 U.S. at 224.

In *Roth* the Court found that a professor had no property interest even though he was deprived of his job, a loss which was surely a matter of great substance. There was no property or liberty in a prisoner's claim that he could not be transferred. *Meachum v. Fano*, 427 U.S. 220. *Bishop v. Wood*, 426 U.S. 341, found there was no property right in continued employment under an ordinance which merely conditioned an employee's removal on compliance with certain specified procedures and that the employee served at will and pleasure. In *Paul v. Davis*, — U.S. —, 96 Sup. Ct. 1155, the Court held that reputation alone did not implicate any liberty or property interest.

On the other hand the Court recognized in *Bell v. Burson*, 402 U.S. 435, 91 Sup. Ct. 1586, that the state by issuing driver's licenses recognized a right to operate a vehicle on the highways and could not withdraw this right without giving the petitioner due process.

Likewise in *Morrissey v. Brewer*, 408 U.S. 471, 92 Sup. Ct. 2593, the state could not alter the status of a parolee. The status or right was recognized by state law which was altered or distinguished.

Welfare recipients who had statutory rights to welfare so long as they maintained their qualifications had property right. *Goldberg v. Kelly*, 397 U.S. 254.

Good time credits accumulated under state law could not be denied without procedural due process since this was liberty. *Wolff v. McDonnell*, 418 U.S. 539.

Statutory created property interests were conceded by the United States in *Mathews v. Eldridge*, 424 U.S. 319.

In *Goss v. Lopez*, 419 U.S. 565, the Court found property in denial of a continuation of educational opportunity once the state had provided it for the child.

On the other hand, in *Lindsey v. Normet*, 405 U.S. 56, 92 Sup. Ct. 862, the Court found that due process was not violated by the Oregon Landlord and Tenant statute. Just as this case is dealing with utilities, the *Lindsey* case dealt with the right to retain peaceful possession of one's home and the need for decent shelter. This Court found that the Constitution does not provide judicial remedies for every social and economic ill and recognized the common law right to self help on the right of the landlord. Landlord and tenant or forcible entry and detainer statutes were passed to protect tenants as well as landlords and obviate resort to self help.

The common law right is not in the customer. The customer has the right to receive the utilities during the time that he pays therefor according to the rules and regulations of the company. The right is in the company to terminate upon reasonable, fair and nondiscriminatory rules and regulations which it adopts. There is no property right in the customer but the property right is in the company or utility which may terminate for nonpayment always knowing that a mistake in termination is at its peril.

Utility Service Is Not a Property Right.

Utility services are not property rights in Tennessee. The Tennessee Supreme Court in *Patterson v. City of Chattanooga*, 192 Tenn. 267, 241 S.W. 2d 291, held that the discontinuance of utility services (water service) did not deprive the owner of *property or property rights.*

The Tennessee Supreme Court was considering whether or not a water company may discontinue the water service for the

refusal of the property owner to pay the sewer service charge. The City of Chattanooga had required that all persons receiving water would pay a sewer charge based upon the amount of water consumed and therefore discharged through the sewer. The Court found that was a necessary incident to the use of water and that the regulation was proper.

In discussing the right to terminate services of a utility for nonpayment, it considered property and held as follows:

> "We next consider the question of whether or not the Water Company may discontinue the water service for the refusal of the property owner to pay the sewer service charge. Does the discontinuance of the water service deprive the property owner of property or property rights in violation of Article 1, Sections VIII and XXI, of the Constitution of Tennessee or the Fifth Amendment of the Constitution of the United States? 'The general rule is that those furnishing the public with its water supply, either in a private or a *municipal* capacity, may adopt, as a reasonable regulation for conducting said business, a rule providing that the water so furnished may be cut off for nonpayment therefor; and in pursuance of such regulation the water supply may be discontinued on the failure of the consumer to pay the water rates.' *Dodd v. Atlanta*, 154 Ga. 33, 113 S.E. 166, 167, 28 A.L.R. 465."
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> 241 S.W.2d at 295.

The Supreme Court of Tennessee stated that insofar as it could find every state in the Union, where the question has arisen, has held in accordance with the above rule.

All states now recognize the privilege or entitlement of utility systems to discontinue service to a customer who has defaulted in payment for his services. This privilege or entitlement is based upon the unequivocal theory that higher rates would re-

sult if a utility is required to go through standard collection procedures prior to cutoffs, most bills being relatively small in comparison to the cost of collection. It is also apparent that continued service (or failure to cut off) after default would tend to create a loss of revenue and thus higher rates. The paying customer would in effect be carrying those in default who were still receiving service. Although the term "privilege" or "entitlement" has been used, it has been called not only a right but an *obligation* on the part of a utility to discontinue service for nonpayment.

The usual rules of private utilities and certainly the rules from municipally owned utilities in Tennessee clearly show that a distributor must necessarily give some type of cutoff notice to the defaulting customer. At least this is a *partial safeguard against liability*. Most public service commissions have adopted regulations which require a notice before cutoff and a reasonable time for the customer to pay the bill after receiving the bill or notice stating that utilities would be terminated unless payment was received by a certain date.

The Tennessee Supreme Court referred to two very early Tennessee cases of *Jones v. Nashville*, 109 Tenn. 550, and *Farmer v. City of Nashville*, 127 Tenn. 509, which held that water services could be withheld or terminated for failure to pay or to abide by rules and regulations and therefore this almost indispensable right to water was not property or a property right.

Jones v. Nashville, supra, held that the City of Nashville was correct in refusing to furnish water to an individual with an outstanding indebtedness or water bill. Linnie D. Jones sought damages for failure and refusal of Nashville to supply her with water. The City Water Company relied upon the ordinance which provided that she must pay her past indebtedness which she refused to pay upon proper notice and demand and there-

fore she had not complied with their rules and regulations. Linnie Jones contended that the ordinance was harsh, oppressive and discriminating to coerce and compel the inhabitants receiving water supply to pay past due indebtedness created for water furnished them by declining further supply until such indebtedness was paid although she was willing and ready to pay for the water desired. The Tennessee Supreme Court felt that every inhabitant of the City was secured a continuous supply of water by complying with the provisions of the ordinance and any person, regardless of their circumstance in life, will be refused water upon their failure to observe the conditions of the ordinance. The ordinance requiring payment of bills and past due indebtedness was plain and unambiguous. A notice was required to be given of the amount due and the time within which payment must be met before the supply is turned off; and no one can be taken by surprise or should be unprepared to meet their just dues for the service rendered them. The Court pointed out that prompt collection is necessary and the City would be put to the expense of a multitude of petty suits annoying to it and harassing to its inhabitants. It further held that the enforcement of the ordinance against Linnie Jones furnishes her no legal cause of complaint against the defendant.

In *Farmer v. Nashville*, 127 Tenn. 509, the Court held that Nashville could not deny the tenant water for failure of the landowner to pay a past due water bill. The tenant had wanted unmetered water services for a period of six months pursuant to the rules and regulations of the company. The Court further found that the requirement of the City that all unmetered assessments be paid in advance with ample protection against any loss on account of delinquent users.

Two even earlier Tennessee cases are cited with approval. *Watauga Water Company v. Wolfe*, 99 Tenn. 429, and *Crumley v. Watauga Water Company*, 99 Tenn. 420. In the *Wolfe* case, Wolfe had been a patron of the company accustomed to

leaving his hydrant open so that large quantities of the escaping water went to waste. His claim was that the water so wasted was *stale* and not fit for use, but the company thought the water not stale and the waste excessive. Wolfe applied for water again and refused to comply with the company's rule that the hydrant be kept closed except when using the water since he only thought the water to be "pure" when kept continuously running. The Tennessee Court upheld the right to deny him water holding that the rule was reasonable and Wolfe's refusal to comply with it disentitled him to receive the water.

The Tennessee Court outlined what are reasonable and general rules regarding a public utility whether private or municipal. It stated:

> "It is bound to furnish the commodity, which it was created to supply, to the City and all of its inhabitants upon the terms designated in its contract (the same being fair and reasonable), and without discrimination . . .
>
> "Though impressed with a public use, and under legal obligation to furnish water to all inhabitants at designated rates, and without discrimination, the defendant company is allowed to adopt reasonable rules for the conduct of its business and operation of its plant, and such rules, so far as they affect its patrons, are binding upon them, and may be enforced by the company, even to the extent of denying water to those who refuse to comply with them."
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> 99 Tenn. 431, 432.

In *Crumley*, the plaintiff had been a patron of the company and in debt to them for Fifteen Dollars ($15.00). He had given his note which the Court calls his due-bill in settlement with the company. At a later time he applied for water tendering the price of one quarter's rent in advance according to the company's rules. The company refused and the Court, citing authorities, stated that a water works company was also a quasi

public corporation. It must supply water to all who apply therefor and offer to pay the rates. Since the water company had settled with him for his past due indebtedness by taking his note for the earlier period the water company must supply the water now.

The right to receive utility services is somewhat different from the right to have utility services extended for the purpose of serving a customer. The Tennessee Supreme Court in *Chandler Investment Company v. Whitehaven Utility District*, 44 Tenn. App. 1, 311 S.W. 2d 603, has held that a utility company is not required to furnish services to every person within the district but may require, under its reasonable rules and regulations, financial contributions for extensions to serve such property.

A utility company, by the nature of its creation, is to furnish the inhabitants of the City the service upon reasonable terms and without discrimination. The reasonable terms that it may adopt are nondiscriminatory rules and regulations and foremost among these rules is that the inhabitants shall pay their proper proportion of the expense of this service and upon failure the service will cease. The rules and regulations are binding upon the inhabitants or patrons of the service and may be enforced to the extent of denying the service to those who refuse to comply with the rules and regulations including payments for services.

The rules and regulations established by the Memphis Light, Gas and Water Division provide at least thirty days from the time that a bill is sent until time that services cease for nonpayment.

The customer's meter is read and within five days he receives the bill. He has fifteen (15) days to pay the net amount approximately and five (5) days to pay the gross amount before he receives a final notice stating that his services will be terminated in another five (5) days unless payment is made.

There is no statute which gives any property right or property in these utility services offered under these rules and regulations. The common law does not protect any such customer from these rules and regulations adopted so long as the rules and regulations are not discriminatory and are fair. In fact the common law is in favor of the utility to discontinue and does not protect the customer by requiring continued service until terminated by due process.

The evidence clearly shows that any customer could claim that his bill was in error and that he had a dispute. In fact, the concern of the Division is shown because approximately thirty-three thousand checks were made of meters and extensions granted because a customer made a high bill complaint and claimed possible error.

The Crafts and others in the original suit attempt to distinguish between termination for nonpayment and termination for a dispute. Utility services have been used whether or not they are correctly billed and procedures for termination, when we are discussing several hundred thousand customers, must be simple and uniform. The customer is advised of the payment date. The customer, from the time of his meter reading until payment date, has more than thirty (30) days upon which to bring notice or attention of errors to the company. Certainly adjustments were shown to have been made even in the meager proof introduced by the plaintiffs. The Division, however, showed the numerous checks of complaints and trained employees available in the Information Center and in the Credit Department.

The common law and rules and regulations concerning utilities have created a self help rule and that is termination for nonpayment. There is no common law nor statute in Tennessee which would make utility services a property right.

The utility, in exercising its right of self help and terminating for nonpayment, acts *at its peril* when there may be a dis-

pute between it and the customer. A recent case of the Tennessee Court of Appeals points out the rule for wrongful discontinuance. *Trigg v. Middle Tennessee Electric Membership Corporation,* 533 S.W.2d 730 (1976). The rule is stated by the Court as follows:

> "A company supplying electricity to the public has the right to cut off service to a customer for nonpayment of a just service bill and the company may adopt a rule to that effect. Annot., 112 A.L.R. 237 (1938). An exception to the general rule exists when the customer has a bona fide dispute concerning the correctness of the bill. *Steele v. Clinton Electric Light & Power Co.,* 123 Conn. 180, 193 A. 613, 615 (1937); Annot., 112 A.L.R. 237, 241 (1938); *see* also 43 Am.Jur., Public Utilities and Services, Sec. 65; Annot., 28 A.L.R. 475 (1924). If the public utility discontinues service for nonpayment of a disputed amount it does so at its peril and if the public utility was wrong (e.g., customer overcharged), it is liable for damages. *Sims v. Alabama Water Co.,* 205 Ala. 378, 87 So. 688, 690, 28 A.L.R. 461 (1920). Ordinarily the question whether the dispute between the customer and the utility was bona fide is for the trier of fact."
>
> 533 S.W. 2d at 730.

The customer had complained that he had not received in the mail his bill until after the due date when the penalty or gross amount became due and there was a dispute over One and 51/100 Dollars ($1.51). There was a series of letters exchanged until finally the utility company on August 19, while the customer was on vacation, sent another bill and stated that if the total amount was not paid the service would be discontinued by September 12, 1969. On the same date that the bill was sent, or August 19, 1969, and regardless of the notice, an employee of the utility company went for the purpose of disconnecting the electricity, saw the customer was absent and left a

notice stating that the service would have been terminated if someone had been at home. On the 26th, when the notice was still on the door, the service was disconnected by another employee and on the 27th the customer returned with considerable damage to his home. The question was before the Court of Appeals on the motion for judgment on the pleadings similar to the Federal Rule of Civil Procedure 12(c). The Court found there was a bona fide dispute and remanded the case back for trial on the merits. The Court went on to state:

> "We hold that in Tennessee, a public utility, when terminating service to a customer, must act reasonably when the discontinuance of the service might present an obvious danger of damage to the property of the customer."
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> 533 S.W. 2d at 734.

The Court further stated that it did not hold that a public utility can never terminate service when a customer is absent nor did it hold that *actual notice* is always necessary. Here, however, it appeared from the pleadings that the dispute had gone on for several months and the utilities action in terminating service without actual notice when no one was home was unreasonable under the alleged circumstances.

The Tennessee Court is therefore continuing to hold that a utility company may terminate but, if it does so when there is a bona fide dispute, it may do so at its peril and be liable for any damages.

The right of any customer under the common law adequately protects that customer if there is a discontinuance.

A utility trying to serve customers fairly and without discrimination must reasonably enforce all of its rules. Its rules require that the customer be forwarded the bill and have ample opportunity to pay. Failure to pay is reasonable ground for ter-

mination and there is no property right in such utility services which would require that there could be no termination of utility services without notice and a pre-termination hearing. Neither the common law nor the statutes of Tennessee so require.

Reasons Cited Why Utility Service Is or Is Not Property.

The Sixth Circuit in its Opinion in this case (Appendix A, Petition for Certiorari) relies upon its prior case of *Palmer v. Columbia Gas*, 479 F.2d 153, and other cases of federal appellate or district courts to hold that claims to continue utility service constitute "property". The Sixth Circuit clearly admits that in the *Palmer* case, it *implicitly assumed* that claims to continue utility service constituted property. There is no discussion of what statute, rule or other entitlement made such continued service property.

In *Palmer v. Columbia Natural Gas*, 479 F.2d 153, the Sixth Circuit, in Footnote 12, stated that the company apparently conceded that its service is a specialized type of property which presents distinct problems in our economic system, the taking of which may impose tremendous hardship upon its customers. The Sixth Circuit therefore discusses no statute or other rule requiring that utility service be classified as property.

In *Davis v. Weir*, 497 F.2d 139, the Fifth Circuit indicates that the water company *conceded* on appeal that due process demands pretermination notice to the actual user while, on the other hand, stating that the plaintiffs do not contend that they are entitled as a matter of right to free water service or that an application for such service cannot be made subject to the payment of installation or metering charges or the posting of a security deposit indicating that under state law, the obligation to furnish water is conditioned upon the applicant's compliance with reasonable administrative rules and regulations. The Court

went on to hold that the tenant cannot be responsible for prior debt of the landlord which is what the Tennessee Supreme Court held in 1912.

In *Stanford v. Gas Company*, 346 F. Supp. 717, the District Court relied upon the Preamble to the Constitution to hold that whether the classification of utility service are rights, privileges or entitlements such life-sustaining services would seem to fall within the same constitutional protection afforded welfare benefits, wages, driver's licenses, reputation in the community and possession of personal property citing well-known cases of this Court. In *Hattell v. Public Service Company of Colorado*, 350 F. Supp. 240, the Court does not discuss property but whether state action was present thus requiring due process.

In *Bronson v. Consolidated Edison of New York, Inc.*, 350 F. Supp. 443, the District Court relies upon the Transportation Corporation's Law, Section 15, which provides that the company may terminate any person after five days' written notice. The Court then stated that since the state has undertaken to provide the service to the public, then it must comply with the requirements of due process before it can terminate access to such service or benefits.

In *Limuel v. Southern Union Gas Company*, 378 F. Supp. 964, the Texas District Court recognized that the plaintiff must have a claim of property as defined by the Constitution or laws. The Court then relied upon the Texas Public Utility statute which provided that it was the policy of the state that continuous service by public utilities furnishing . . . natural or artificial gas . . . to the public is absolutely essential to the life, health and safety of all the people and that the wilful interruption or stoppage of such service by any person or groups of persons is a public calamity which cannot be endured. The statute was designed to protect public utilities from disruption

by picketing, threats or intimidation. Likewise, the franchise from the City of Austin said that the company should establish and maintain first class and modern service. The Court therefore held that the customer had a legitimate reliance upon continued service even though the ordinance of the City contemplates the company's right to collect a reasonable price for the gas sold.

In *Donnelly v. City of Eureka*, 399 F. Supp. 64, the Court pointed out that the defendants had *conceded* that due process provisions of the Constitution require that notice and opportunity to be heard must be provided to water subscribers before termination of service. The Court stated that when a *municipality* is the sole source, this service becomes a constitutionally protected entitlement.

In *Condosta v. Vermont Electric Cooperative, Inc.*, 400 F. Supp. 358, the District Court cited *Board of Regents v. Roth*, 408 U.S. 564, and relied upon the Vermont law which was a general statement of the utility law that a utility company shall sell and distribute the same to any and all persons that desire to use the same within this state. The Court further stated that the plaintiff relies upon electric service in his daily life and cannot be questioned and that probably no other single utility service is so vital to a persons day to day existence.

In *Koger v. Guarino*, 412 F. Supp. 1375, the Court held that water service should be considered as indispensable to life and health and not simply a mere convenience of today's urban society. It found that the utility company was not constitutionally obligated to establish and maintain water service for the benefit of their citizens but that the Philadelphia Water Company, once having done so, a user has a legitimate claim of entitlement to continued service absent sufficient cause for termination consistent with the procedural protections of the due process clause. The Court relied upon the analogy stated

by this Court in *Goss v. Lopez*, 419 U.S. 565, that there is no constitutional right to public school education but once started then a state cannot withdraw the right without due process procedures.

In *Dawes v. Philadelphia Gas Commission*, 421 F. Supp. 806, the District Court distinguishes the decision of the Third Circuit in *Jackson v. Metropolitan Edison Co.*, 483 F.2d 754, aff'd; 419 U.S. 345, by relying upon *Goss v. Lopez, supra*, that once service is established voluntarily then it cannot be withdrawn without due process. The Court says that *Goss* effectively overturns *Jackson* that there is no constitutionally protected right to continued utility service once that service has been furnished even if, as *Jackson* also ruled, there is no constitutional right to utility service in the first instance.

Petitioners contend in all of these cases that the Courts have struggled to find reasons and have stretched statutes to hold that continued utility service was property. The Courts in some cases have indicated the parties have conceded the issue. Petitioners contend that the true rule is that the utility has the common law right to terminate services for nonpayment and this common law right has been placed in some rules of Public Service Commissions that a utility may terminate for nonpayment. The rule is to protect the utility and the remaining paying customers of the utility and that once the utility has forwarded the bill, with reasonable time to pay or else be terminated after the due date, there is no continued right or entitlement on behalf of the nonpaying customer. The fact that there is a hardship on a person because he does not have electricity, gas or water does not change the rule that it is the utility which is under an obligation to terminate for nonpayment in order to treat all customers fairly and on a nondiscriminatory basis.

The Constitution is not the cure for all social and economic ills.

On the other hand, several decisions have held that utility service or continued utility service is not property.

Jackson v. Metropolitan Edison Company, 483 F.2d 754, was affirmed by this Court on the ground that there was no state action. The Third Circuit held that the state was not obligated to furnish electricity without charge to its citizens. Those who wished to avail themselves of it must pay for it and the tariff provides reasonable notice must be given before termination. The Third Circuit relied upon *Lindsey v. Normet*, 405 U.S. 56, that there was nothing in the Constitution which allowed a tenant to occupy real property of his landlord beyond the term of his lease without the payment of rent.

In *Lucas v. Wisconsin Electric Power Company*, 466 F.2d 638, in an opinion written by Justice Stevens while on the Seventh Circuit Court of Appeals, it was noted that the plaintiffs made no claim that the defendant power company has any obligation to provide electric service to anyone who is unable to pay his bills. In discussing the fact that the plaintiff presently was indigent, Justice Stevens pointed out that the Supreme Court has explicitly recognized the importance of requiring all customers of a regulated public utility to pay their bills promptly in order to foréstall discrimination. See Footnote 9 at Page 645. The case was then decided on whether the utility company was operating under color of state law and found there was insufficient support and affirmed the dismissal of the suit against the electric company. The comments of Justice Stevens regarding the availability of other rights will be commented on later in this brief.

If Continued Utility Services Are Property, the Procedures of the Memphis Light, Gas & Water Division Meet Due Process.

If the Court decides that utility services are property and due process applies, then according to the often quoted phrase

of the Court from *Morrissey v. Brewer, supra*, "the question remains what process is due."

The Memphis Light, Gas & Water Division contends that its rules and regulations on billing and termination are sufficient. The Sixth Circuit held that the final notice *was constitutionally sufficient* for a customer like Parks who asserts an inability to pay and an admitted liability. The Opinion states that the Division had a rather well defined and well publicized extended payment plan to permit partial payments of certain delinquent accounts to forestall utility termination.

The Division contends that its final notice with enclosures, together with its Credit Department procedures, meter reader and service man procedures are sufficient both for admitted liability or any other claim concerning the utility service and that the customer coming to the credit office has a sufficient pre-termination hearing.

The Division's first bill is sent to the address designated by the customer and is adequate time for payment. There is an additional five (5) days after the net day to pay before a final notice is sent.

The final notice has with it an enclosure advising that the Credit Department is open to customers giving its location and hours. These credit counselors are experienced responsible employees designated to hear complaints. If one complains about the bill to any business, one goes to the Credit Department.

The telephone operators are service advisors and may grant extensions of time on the telephone of up to three (3) days to customers calling in who have received a final notice. These operators have direct access to the computer to forestall any termination.

The computer is programed to print customer cut offs for all persons receiving final notices and is further programed to

eliminate all cut offs when payments are made prior to that date.

The computer is further programed to eliminate cut offs from either the service advisors or the Credit Department when additional extensions are granted.

The meter reader has written instructions to contact personally the customer before making any cut off. He further has written instructions concerning when a customer appears to be on a vacation, when there is hardship or illness or the customer claims the bill has been paid. If the customer lies to the meter reader and payment has not been made then all three (3) services would be cut off if payment had not been received or satisfactory arrangements made five (5) days later when the service man makes the total service cut off.

The meter reader or service man is further instructed to leave the door knocker at the entrance which appears to be normally used so that the customer will be aware of the cut off and what he may do to reinstate services.

The credit counselors or credit office have trained personnel and, as shown by the record, do make adjustments and have supervisors available for consultations upon demand of the customer.

The record clearly shows that some of the plaintiffs such as Ms. Pintchuck or Mrs. Funzey either received extended payments or adjustments.

The Division contends that it more than meets the minimum due process suggested by Justice Marshall in his dissent in *Jackson v. Metropolitan Edison* when he stated:

> "Accordingly, I think that at the minimum, due process would require advance notice of a proposed termination

> with a clear indication that a responsible company official can readily be contacted to consider any claim of error."
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> 419 U.S. at 373.

Utility services are still a bargain. An example is the Crafts' bills which, even though separate, show that utility services furnished to them for their house in which twelve or thirteen people live were reasonable. For example, for the typical summer month of July, 1973, the service shows that from June 27, 1973, the total of the two accounts for gas, electricity, water, city service fees and sewer charge totaled Fifty-Four and 87/100 Dollars ($54.87) or less than Two Dollars ($2.00) a day. When the Crafts were receiving two bills for the month of December, 1973, or the meter reading dates of November 27 through December 28, the total was Forty-Nine and 83/100 Dollars ($49.83) or approximately One and 75/100 Dollars ($1.75) a day for their three (3) utility services plus sewer and service fee. When the services were combined for the winter month of January 29th through February 27th, the total for gas, electricity, water, city service fee and sewer charge was Forty-Three and 03/100 Dollars ($43.03) or about One and 50/100 Dollars ($1.50) per day. Utility costs have risen and will continue to rise but utility services such as water are extremely low for the benefits received whereas gas and electricity are probably less now than their costs thirty (30) or forty (40) years ago in comparison with the wages or income of the homeowner.

The Division accepted the suggestion of the District Court and revised its notice to be sure that every person not only could ask for extended credit but could discuss any dispute with the credit counselors and that supervisory personnel were available to answer any further questions.

Counsel would report to the Court that although certified mail was used, the Division suggested that if the customer were

not home the Post Office merely leave the letter and mark on its form delivered as ordinary mail so that there would be evidence of delivery. Since that time there has been a dispute between the Postal Union and the Post Office officials so that no such notice would be marked and, after a short trial period of using certified mail only, the Division has advised the District Court that it will use ordinary mail on its final notice rather than certified mail. This was consented to by the attorney for the plaintiff since a survey showed that approximately fifty percent (50%) of the persons did not sign for the certified mail and less than half of the people went to the Post Office to pick up their certified letter before the termination would be effective.

The Division respectfully submits that if utility services are property its procedures for notice and some type of pre-termination hearing meet the minimum standards of due process.

Are Common Law Remedies Sufficient Due Process?

The Memphis Light, Gas & Water Division we contend has demonstrated an enlightened policy of dealing with persons in financial difficulty and in providing accurate and efficient service to its customers. Unlike *Palmer v. Columbia Gas, supra,* the District Court, in its opinion, distinguished the many practices which were found callous with the efficient and enlightened practices of the Division.

The Division read every meter every month and if unusual conditions prevented the reading of the meter for one month it was read in the next month even if it meant averaging another cycle so that no customer would receive a "surprise". The Division maintains 35 to 40 trained service advisers who receive telephone calls and are empowered to granted extensions (91% or 43,000 granted during 1973) and further insured that there was an investigation of high bill complaints. In fact, the records

of the Division indicate that cutoff procedures were delayed and investigation of high bill complaints were made of 33,000 customers during the year 1973. The Division had adopted reasonable rules for notices of its termination as shown by the final bills.

The Division had also sent to all customers with the final bill a flyer that if there was any difficulty on payment or if there was a *dispute*, the customer could contact the credit office at the main office of the Division. It is ridiculous to state that the fact that there was not the magic word "dispute" that a person receiving a final notice together with a flyer stating that if he had difficulty in paying he should contact the credit office that the customer would not know to contact the credit office if his difficulty in payment resulted from his *dispute* as to the *correctness* of the bill.

In any event, we believe that the common law rights available to the customer were fully adequate to afford due process. This Court in the recent case of *Ingraham et al. v. Wright, et al.,* — U.S. —, 45 Law Week 4364 (April 19, 1977), held at common law a teacher may impose reasonable but not excessive force to discipline a child and that such an interest was liberty and protected. The Court, after having decided that the interest was protected, must decide what procedures constitute "due process of law." The Court then stated:

> "We find that corporal punishment in public school implicates a constitutionally protected liberty interest, but we hold that the traditional common law remedies are fully adequate to afford due process."
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> 45 Law Week at 4369.

This Court has repeatedly pointed out that it has rejected the notion that *any* grievous loss is sufficient to invoke procedural protections of the due process clause. The Court has

stated it looks not to the *weight* but to the *nature* of the interest at stake.

The interest here is the continued use of a utility service whether water, electricity or gas.

The service has been provided on a non-discriminatory basis under the decisions of a common law that a utility must provide fair and non-discriminatory service equally to all persons, including the common law provision that a utility could cut off service for nonpayment of bills. In fact, Justice Stevens states this in *Lucas v. Wisconsin Electric Power Company* when writing that opinion for the Seventh Circuit when he stated in Footnote 15

> "It is undisputed that at common law a utility could cut off service for nonpayment of bills."
>
> 466 F.2d at 647.

The Courts generally and the Tennessee courts have recognized the informal and formal remedies that are available to a utility holder. The first are the informal remedies established by the company. The Division has established that prior to cut off for nonpayment of utility services, the customer has fifteen days from the date bills are mailed to pay the net due. The customer is allowed five additional days after the last day to pay the net before a final notice is mailed. The final notice advises that utilities will be terminated for nonpayment and that if not paid by 5:00 P.M. on the date, the service will be disconnected. Enclosed within the final notice bill is either one of two flyers or stuffers indicating that if there is any problem or dispute, the credit office should be contacted or, in case of bills going to low-income neighborhoods, there is the statement that credit counselors are available in the neighborhood. The Sixth Circuit placed great emphasis on the fact there was no mention of the word *dispute* on the flyers to low-income areas but we believe

that the notice advising of credit counselors would certainly advise the person to come in whether or not there was a dispute or there is merely difficulty in paying. Certainly, the records of the Division indicate that 62,000 customers contacted the Credit Department although it is unknown if some of these required adjustments because of errors. Certainly, there was an adjustment on one of the plaintiffs involved in this lawsuit.

Most credit disputes would be resolved by the Credit Counselors.

The formal remedies available to a customer were set forth by Justice Stevens in *Lucas* and such remedies are available under the common law. There are really three in number.

The first is the customer has the right to seek emergency relief in the state courts to forestall a disconnection. The second is the customer may pay under protest and then sue for a refund. The third, as demonstrated by the holding of the Tennessee Court in *Trigg, supra,* is that the customer may sue for damages because the company wrongfully cut off the service. This again is the common law remedy.

The Courts, in discussing property, have looked to the customer. The common law entitlement or right was that established for the *utility company,* that is the right to terminate services for failure to pay. The Courts have attempted to turn around this method of self-help to indicate that it is the entitlement of the customer for continued service once the utility company, whether private or public, extends the services under either the regulations of a public utility commission or the regulations of the city or entity which owns the utility.

The utility has the right of termination which it may exercise at its peril.

The Memphis Light, Gas & Water Division respectfully submits that the customer has sufficient common law protection adequate to afford due process.

State Action.

The petitioners presented for review the question of whether the cut off policies of a municipally owned utility operating in a proprietory capacity without governmental immunity but on a nonprofit basis should be subject to the provisions of the Fourteenth Amendment requirements of due process.

Counsel realizes that the Division as a municipally owned facility constitutes "state action."

Counsel in this question really meant to state that the Memphis Light, Gas & Water Division could not adopt any procedures or rules which were discriminatory. It must adopt fair rules to extend service to all customers, including rules for payment and for reasonable extensions under certain conditions. It must further adopt reasonable rules to terminate services to a customer. These rules are established not by municipal ordinance or state law but are really codifications of the common law rules and regulations directed towards utility or other monopoly types of business. The Division, under its Charter, has the authority to adopt "reasonable" rules and regulations. The law has always recognized that when a municipality enters into a traditionally proprietory function it is subject to suit by its customers for denying services, terminating services or for failure to extend services. The utility must adopt rates which are nondiscriminatory and is subject to suit concerning the adoption of such rates. It operates in all ways similar to a private utility except that it is municipally owned and, in most cases, a nonprofit organization.

We feel, therefore, that the Court should not find that the utility services offered by a municipality are, therefore, in and of itself, "property rights" merely because of the municipal ownership. This seems to be the reasoning of some lower court decisions.

CONCLUSION

We respectfully request that this Court hold that there is no property interest and dismiss the Complaint of the plaintiffs. If the Court finds there is a property interest, we respectfully request the Court to find that there are adequate common law remedies available to afford due process.

In the alternative, we request the Court to affirm that the final notice and hearing or credit plans for persons with admitted liability, such as Mrs. Parks, are constitutionally sufficient and should be affirmed. We further request the Court to reverse the Court of Appeals and find that the notice and hearing provisions for any person with a disputed bill for any reason are sufficient.

Respectfully submitted,

FRIERSON M. GRAVES, JR.
Counsel for Petitioners

APPENDIX

APPENDIX A

AMENDMENT 14

§ *1. Citizenship—Due process of law—Equal protection.*— All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 683. Rules and regulations of commissioners.

Said board of light, gas and water commissioners shall have the power and authority to promulgate and enforce such rules and regulations governing the distribution of light, power, gas and water, as they may deem proper in the operation of said light, gas and water division. (Priv. Act. 1939, ch. 381, § 8)

Sec. 691. Disposition of revenue of light division.

The revenue received each year from the operation of the light division, before being used for any other purpose, shall be used for the following purposes, in the order named, to-wit:

(1) The payment of all operating expenses of the light division for the year.

(2) For interest accruals and sinking fund accruals on bonds and mortgages issued for the benefit of the light division.

(3) For cash payments to a working capital reserve, a renewals and replacement reserve, and a casualties reserve, for the benefit of the light division, said cash payments to said reserves to be in such amounts as the light, gas and water commissioners think proper and by resolution elect to set up from time to time.

(4) For payment to the general funds of the municipality a sum equal in amount to what would be the city taxes on the properties of the light division within the city limits of the City of Memphis if said properties were privately owned.

(5) For payment to a reasonable surplus account which may be used by the board of light, gas and water commissioners for extensions and improvements to the light plant or system and/or for the purchase of outstanding bonds that may have been issued for the benefit of the light division, as the board of light, gas and water commissioners may deem advisable.

(6) For payment to the general funds of the municipality a sum not to exceed a cumulative return of six per cent (6%) per annum of the equity or investment, if any, of the municipality in the properties of the light division, the said percentage to be fixed by resolution of the board of commissioners of the City of Memphis. Should the said percentage as fixed by the board of commissioners of the City of Memphis exceed a reasonable figure in the opinion of the board of light, gas and water commissioners, the amount to be paid by the board of light, gas and water commissioners to the board of commissioners of City of Memphis shall be determined by a board of arbitration consisting of one member of the board of city commissioners and one member of the board of light, gas and water commissioners, who shall

elect a third member, and the findings of this board of arbitration shall be final and binding on both the board of city commissioners and the board of light, gas and water commissioners.

Provided that in no event shall the aforesaid payment to the municipality for any year exceed one-half of the net profits realized by the light division during that year, unless the board of light, gas and water commissioners shall, by resolution, consent thereto.

(7) Any surplus then remaining, over and above safe operating margins, shall be devoted solely to rate reduction.

It is further provided that said allotment of funds may be changed in such manner as may be deemed necessary by the board of light, gas and water commissioners in contracting with the Tennessee Valley Authority for the purchase of power, or as may be deemed necessary by the board of commissioners of the City of Memphis, with the approval of the board of light, gas and water commissioners, in the issuance and sale of any bonds or notes on behalf of the electric system, or on behalf of the electric system in conjunction with the gas or water systems. (Priv. Acts 1939, ch. 381, § 19)

Sec. 692. Disposition of revenue of water division.

The revenue received each year from the operation of the water division, before being used for any other purpose, shall be used for the following purposes, in the order named, to-wit:

(1) For the payment of all operating expenses of the water division for the year.

(2) For interest accruals and sinking fund accruals on bonds or mortgages issued for the benefit of the water division.

(3) For cash payments to a working capital reserve, a renewals and replacement reserve, and a casualties reserve, for the benefit of the water division. Said cash payments to said reserves to be in such amounts as the light, gas and water commissioners think proper and by resolution elect to set up from time to time.

(4) For the payment to the general funds of the municipality a sum not to exceed a cumulative return of three per cent (3%) per annum of the equity or investment, if any, of the municipality in the properties of the water division, the said percentage to be fixed by resolution of the board of commissioners of the City of Memphis. Should the said percentages as fixed by the board of commissioners of the City of Memphis exceed a reasonable figure in the opinion of the board of light, gas and water commissioners, the amount to be paid by the board of light, gas and water commissioners to the board of commissioners of the City of Memphis shall be determined by a board of arbitration, consisting of one member of the board of city commissioners and one member of the board of light, gas and water commissioners, who shall select a third member, and the findings of this board of arbitration shall be final and binding on both the board of city commissioners and the board of light, gas and water commissioners.

(5) Any surplus thereafter remaining shall be retained by the board of light, gas and water commissioners and may be used by them for expansion and enlargement of the water division and/or purchase of bonds that may have been issued and outstanding for the benefit of said division.

(6) Any surplus thereafter remaining over and above safe operating margins, shall be devoted to rate reduction.

It is further provided that said allotment of funds may be changed in such manner as may be deemed necessary by the board of commissioners of the City of Memphis with the approval of the board of light, gas and water commissioners in the issuance and sale of any bonds or notes on behalf of the water system, or on behalf of the water system in conjunction with the gas or electric systems. (Priv. Acts 1939, ch. 381, § 20)

Sec. 693. Disposition of revenue of gas division.

The revenue received each year from the operation of the gas division, before being used for any other purpose, shall be used for the following purposes, in the order named, to-wit:

(1) For the payment of all operating expenses of the gas division for the year.

(2) For interest accruals and sinking fund accruals on bonds or mortgages issued for the benefit of the gas division.

(3) For cash payments to a working capital reserve, a renewals and replacements reserve, and a casualties reserve, for the benefit of the gas division. Said cash payments to said reserves to be in such amounts as the light, gas and water commissioners think proper and by resolution elect to set up from time to time.

(4) For payment to the general funds of the municipality a sum equal in amount to what would be the city taxes on the properties of the gas division within the city limits of the City of Memphis if said properties were privately owned.

(5) For payment to a reasonable surplus account which may be used by the board of light, gas and water commissioners for extensions and improvements to the gas plant or system and/or for the purpose of outstanding bonds that

may have been issued for the benefit of the gas division, as the board of light, gas and water commissioners may deem advisable.

(6) For the payment to the general fund of the municipality a sum not to exceed a cumulative return of six per cent (6%) per annum of the equity or investment, if any, of the municipality in the properties of the gas division, the said percentage to be fixed by resolution of the board of commissioners of the City of Memphis. Should the said percentage as fixed by the board of commissioners of the City of Memphis exceed a reasonable figure in the opinion of the board of light, gas and water commissioners, the amount to be paid by the board of light, gas and water commissioners to the board of commissioners of the City of Memphis shall be determined by a board of arbitration, consisting of one member of the board of city commissioners and one member of the board of light, gas and water commissioners who shall select a third member, and the findings of this board of arbitration shall be final and binding on both the board of city commissioners and the board of light, gas and water commissioners.

Provided that in no event shall the aforesaid payment to the municipality for any year exceed one-half of the net profits realized by the gas division during that year, unless the board of light, gas and water commissioners shall, by resolution, consent thereto.

(7) Any surplus thereafter remaining over and above safe operating margins, shall be devoted solely to rate reduction.

It is further provided that said allotment of funds may be changed in such manner as may be deemed necessary by the board of commissioners of the City of Memphis, with the approval of the board of light, gas and water commissioners, in the issuance and sale of any bonds or notes on behalf of the gas system, or on behalf of the gas system in conjunction with the electric or water systems. (Priv. Acts 1939, ch. 381, § 22; Priv. Acts 1945, ch. 18, § 1; Priv. Act 1947, ch. 491, § 1; Priv. Acts 1959, ch. 224, § 1)